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No. 2975

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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COGGESHALL LAUNCH COMPANY (a corporation),

Appellant,

vs.

ELIZA A. EARLY, claimant,

Appellee.

BRIEF FOR APPELLANT.

CLARENCE COONAN,
NAT SCHMULOWITZ,
Proctors for Appellant.

Filed this.....day of October, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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TOPIC I.

Statement of the Case.

This appeal is prosecuted from a judgment of the Southern Division of the United States District Court, for the Northern District of California, First Division.

The petitioners for limitation of liability in the Court below were Coggeshall Launch Company, a corporation, and Hammond Lumber Company, a corporation. The latter is the successor in interest of the Vance Redwood Lumber Company, a corporation, which had among its assets, a contract of conditional sale with the Coggeshall Launch Company, whereby title to the steam vessel

"Antelope" was to be conveyed to the Coggeshall Launch Company upon the latter making certain payments for the same. By virtue of said contract, however, possession and control of said vessel immediately vested in the Coggeshall Launch Company and on the 15th day of January, 1915, the date on which one George D. Early, son of claimant and appellee, lost his life, said vessel was operated solely by Coggeshall Launch Company without participation of any character, by the Hammond Lumber Company or by the Vance Redwood Lumber Company. At that time and prior thereto, the "Antelope", on its evening trip from Samoa to Eureka, transported workmen from the Hammond Lumber Company wharf to the "G" Street dock in Eureka. A large number of these men were carried on the lower of the two decks of said vessel. On the starboard side of the ship there was a cargo-port used to handle freight. This cargo-port was closed by order of the inspectors either by a sliding door or by a bar, the former being used in cold or windy weather, and the latter when the weather was pleasant. The evidence of the petitioners was that always either the bar was up or the door was closed; that sometimes the door was closed and the bar not up, and sometimes the door would be closed and the bar be up. The witnesses for the claimant, whose testimony has been followed by the District Court, was, however, that the bar had always been up before the day of the accident. The passengers on the eve-

ning trip, almost entirely employees from Hammond Lumber Company, returning daily by the "Antelope" from their work, were accustomed, at the landing of the ship, to open the said door or take down the said bar, go out upon the guard rail and clamber up the "G" Street wharf, or jump across an intervening space of water to a freight gang plank which led up to the wharf. The Coggeshall Launch Company and its predecessors, Hammond Lumber Company, had instructed the captain and crew of the "Antelope" not to permit taking down the bar or opening the door, but to have the men go ashore by the upper deck where the passenger gang plank was handled. These instructions were repeatedly given as warnings to the regular passengers, but were constantly disregarded. Considerable attempts were made to prevent such action by passengers but without correcting the same. The action of opening the door or taking down the bar usually was preceded by the blowing of the landing whistle. Captain Krohnkie, who was the master at the time, usually blew the whistle about the foot of "E" Street.

Early, on the occasion of the loss of his life, assisted two companions in opening the door, which had been closed at Samoa. The point at which this act was done, was opposite McKay's wharf, or opposite "B" Street, both of which are in the City of Eureka. Two of Early's companions, Alva Moss and Emmett Whelihan by name, commenced

the opening of the door, and Early assisted when the door stuck about a foot and one-half to two feet from the point toward which it was being opened. In completing the opening of the door the three boys pushed at the end of the door near where the bar would have been if in place. The bar, however, was not up. All the witnesses to the accident noticed this fact and it seems that the light was sufficient to appreciate the same.

After the door was opened Early evidently stepped back a step or so and went overboard. The only witness who gave a clear statement of what happened, and who was a witness for the claimant, stated that Early stepped over onto the guard rail, over the point where the bar would have been, if in place, and lost his balance. Early had opened this door at other times.

The action was commenced by petitioners filing a petition for limitation of liability. To this petition claimant has filed a claim and an answer. While the claim states affirmatively a cause of action, the answer is negative in its terms and sets up no cause of action.

TOPIC II.

Specifications of Errors.

The first group of assignments present the question whether any issues are raised by claimant's

pleadings. This group includes Assignments 17 and 18. Assignment 18 makes the point that judgment on the pleadings should have been rendered for the petitioner and reads as follows:

> "18. The said District Court erred in not rendering judgment for petitioner Coggeshall Launch Company on the pleadings."

Assignment 17 raises the question whether in the absence of sufficient pleadings any evidence adduced by claimant was competent, relevant or material and reads as follows:

> "17. The said District Court erred in not sustaining the objection of proctor for petitioner Coggeshall Launch Company that all evidence introduced by claimant was incompetent, irrelevant and immaterial."

The second group of assignments present the question whether any negligence by the Coggeshall Launch Company, resulting in the death of Early, has been proven. This group includes assignments of errors 5, 10, 11, 12, 13, 15.

In Assignment 10 the point is made that there was no negligence; that Coggeshall Launch Company was not negligent in failing to put a bar across the cargo-port door. Assignment 10 reads as follows:

> "10. The said District Court erred in finding that the petitioner Coggeshall Launch Company was negligent in failing to put up a bar across a cargo-port door and thereupon rendering judgment in favor of said claimant."

In Assignment 11, the point is made that Coggeshall Launch Company was not negligent by failing to protect and warn passengers against opening the cargo-port door. Assignment 11 reads as follows:

> "11. The said District Court erred in finding that the petitioner Coggeshall Launch Company had not protected and warned passengers against opening of the cargo-port door by said passengers and thereupon rendering judgment in favor of said claimant."

In Assignments 12 and 13 the point is made that Coggeshall Launch Company was not negligent in failing to prevent passengers from opening the cargo-port door after having knowledge of the custom of opening the door. Assignments 12 and 13 read as follows:

> "12. The said District Court erred in finding that knowledge of the custom of passengers opening the cargo-port door against orders of the petitioner Coggeshall Launch Company was negligence by the said petitioner and thereupon rendering judgment in favor of said claimant.
>
> 13. The said District Court erred in finding that the death of George D. Early resulted from a failure by petitioner Coggeshall Launch Company to prevent the continuance of the custom of passengers to open the cargo-port door and thereupon rendering judgment in favor of said claimant."

In Assignment 15 the point is made that Coggeshall Launch Company was not negligent in operating the "Antelope" with a crew one man short

and failing to place the bar across opening of cargo-port door. Assignment 15 reads as follows:

> "15. The said District Court erred in finding that the death of George D. Early resulted from the negligence of the petitioner Coggeshall Launch Company in operating the steam vessel 'Antelope' with a crew one man short, the failure to have another member to perform the duties of said absent member of the crew and to put up the bar in the cargo-port door of the steam vessel 'Antelope', and to thereupon render judgment in favor of said claimant."

The third group of assignments presents the question whether the proximate cause of decedent's death was not the negligence of Early, of his companions or of Early and his companions. These assignments are 8 and 9 and read as follows:

> "8. The said District Court erred in failing to find that the death of George D. Early resulted from the concurrent negligent act or acts of George D. Early, one Emmett Whelihan and one Alva Moss, and thereupon to enter judgment in favor of petitioner Coggeshall Launch Company.
>
> 9. The said District Court erred in failing to find that the death of George D. Early resulted from the negligent act of one Emmett Whelihan or from the negligent act of one Alva Moss or from the concurrent negligent act of one Emmett Whelihan and one Alva Moss and thereupon to enter judgment in favor of petitioner Coggeshall Launch Company."

The fourth group of assignments presents the question of contributory negligence on the part

of the deceased. This group of assignments includes Assignments 7 and 16.

The point made by Assignment 7 is that the deceased's conduct was negligent and contributed to his death. Assignment 7 reads as follows:

> "7. The said District Court erred in failing to find that the death of George D. Early resulted from his contributory negligence and thereupon to render judgment in favor of petitioner Coggeshall Launch Company."

The point made by Assignment 16 is that the deceased was guilty of contributory negligence in helping to create the opening through which he fell to his death. Assignment 16 reads as follows:

> "16. The said District Court erred in not finding that the death of George D. Early resulted from the contributory negligence of said George D. Early in that he assisted in creating the open unprotected doorway through which he fell to his death, and in that he approached a doorway which, as was apparent to said George D. Early, was unprotected."

TOPIC III.

Brief of the Argument.

The argument of the appellant will take the following course:

1. That from the condition of the pleadings in this cause, the petitioners were entitled to a judgment on the pleadings (Assignments 17 and 18).

2. That no negligence by Coggeshall Launch Company resulting in the death of Early has been proven (Assignments 5, 10, 11, 12, 13, 15).

3. That the facts disclose that the proximate cause of the accident was the negligence of Early or of his companions (Assignments 8 and 9).

4. That the facts disclose that Early was guilty of contributory negligence (Assignments 7 and 16).

Subtopic I.

FROM THE CONDITION OF THE PLEADINGS THE PETITIONERS WERE ENTITLED TO A JUDGMENT ON THE PLEADINGS.

As stated in the Statement of Facts, the claimant has not stated a cause of action in her answer. The answer of the claimant is set forth on pages 47 to 52 inclusive of the Apostles. At the trial of the cause, and after introducing evidence to prove petitioner's lack of privity or knowledge, and prior to the presentation of claimant's case the petitioner made a general objection to the admission of any evidence by claimant. The objection and ruling are as follows:

Page 78, Apostles.

> "Mr. Coonan. I desire to object to each and every question which is asked by the claimant upon his cause of action upon the ground that each and every question is immaterial, irrelevant and incompetent; and any cross-examination that I may make of any witness is not to be considered as a waiver of that

objection upon my part, or any witness that I might introduce. The only way I can safeguard my rights is by a general objection of that character.

The COURT. Objection overruled.

Mr. COONAN. Exception."

In the judgment of the Court, also, the motion for judgment on the pleadings is denied (page 298, Apostles).

In view of this situation it is the contention of appellant that the petition is affirmative only in its jurisdictional allegation, and is negative in all others; that the answer, and not the claim must state affirmatively a good cause of action, and must state the petitioners' negligence specifically in order to raise an issue with the petition.

The basis of the above contention is contained in Admiralty Rule 27:

> "In all libels in causes of civil and maritime jurisdiction, whether in rem or in personam, the answer of the defendant to the allegations in the libel shall be on oath or solemn affirmation; and the answer shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel, and shall also answer in like manner each interrogatory propounded at the close of the libel."

The applicability of this rule to a limitation of liability proceeding, and a construction thereof is ably set forth in the following words of the Court in *In re Starin,* 173 Fed. 721, at page 722:

"It has been held in *In re Davidson S. S. Co.* (D. C.), 133 Fed. 411, that in proceedings to limit liability an answer to a petition, under rule 56 of the Supreme Court of the United States (29 Sup. Ct. xlvi), should be full and explicit, to the extent required by rule 27 (29 Sup. Ct. xlii) in answering a libel. And it was further held in that case that an allegation in the petition of freedom from fault was sufficient to form the issue raised by allegations of fault in the answer interposed by a claimant. But the allegations of fault were to be stated so as to meet the provisions of rule 23 (29 Sup. Ct. xli), governing a libelant's charges of liability. As to such allegations the petitioner becomes a respondent, and, according to the decision in the Davidson case, may interpose reply to the claimant's allegations, if he sees fit. Further, the claimant must prove his allegations of fault by affirmative evidence other than the mere presumption arising from the accident itself.

It is urged by the claimants herein that their general denial, or, in other words, their denials of the allegations of the petition, are sufficient to raise the issue involved. But it is thought that a libelant should not be called upon to contest without notice any issue that might be raised upon the trial under a mere denial of his averment that the vessel, its officers and navigators, and the owner thereof, were free from fault."

Further on and at page 723, the Court continues:

"The case of The Fri (D. C.), 140 Fed. 123, In re Starin (D. C.), 151 Fed. 274, and McGill v. Michigan S. S. Co., 144 Fed. 788, 75 C. C. A. 518, all bear out the view that the person alleging negligence should specify that negligence to the extent of framing a proper issue; and it would not appear that a mere general denial, or a

> specific charge of negligence in general terms, can inform the parties or the court, to the extent that good pleading requires, where the negligence charged is based upon some particular defect, or some definite omission constituting a failure to exercise proper care."

See, also, in this connection the case of *Pere Marquette 18,* 203 Fed. 131.

The requirement that the answer must be full and explicit in effect compels pleading a good cause of action for negligence in the answer. The Court in *In re Davidson S. S. Co.,* 133 Fed. 411, states the rule at page 412:

> "The claimant, though called into court by the monition to prove any claim it may have, must prove that the damage was caused by fault of petitioner's steamer, or fail of recovery. The petitioner is relieved from confession of liability by the allegations to that end in a petition; but those allegations are incidental only, and do not enter into the consideration of the primary and independent issue tendered by the petition to limit liability. Nor can they serve to relieve the claimant of the need to state and prove a cause of action when the issue of liability is reached without violating well-settled general rules governing such issues; and these rules, under the limited liability act, do not impress me as intending such reversal of the established order of pleading and proving liability."

The preceding statements bring out the fact that the law of pleading in a limitation proceeding demands that he who charges negligence must set forth a good cause of action and prove the same;

that the cause of action must be as full and explicit as a libel; that the general rules of pleading have not been wiped out in this character of proceeding. In the case now before this Court, the answer does not state a cause of action; it does not set forth a full and explicit statement of what the negligence consisted.

It will doubtless be contended that the claim set forth a good cause of action and that alone should suffice. But the law does not so read. The section of Rule 56 which refers thereto is as follows:

> "* * * and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioner under oath shall and may answer such libel or petition. * * * "

In other words the claim is the basis for the answer. It is not the same writing. It is not even a pleading. It is a formality required to give the right to file an answer.

We cannot doubt but that it is the duty of the District Court to have allowed the petitioners to offer evidence of a general character to prove lack of privity or knowledge and then refused permission to the claimant to introduce any evidence at all. This was done in the case of *John H. Starin,* 175 Fed. 527. The Court there states at page 528:

> "In the present action it would be more logical and practicable to grant the motion of the claimants to strike out their answer, leaving them with but a general denial, and forbidding them upon the trial to introduce testimony upon

> the claim of unseaworthiness or negligence as to the matters covered by the particulars ordered. Thus the petitioners will have simply the burden of establishing the prima facie cause in those regards, and the situation will be simplified. This would be in effect a compliance with rule 30 of the Supreme Court of the United States (29 Sup. Ct. xlii) so far as it is applicable."

The preceding cases prove that the answer filed by claimant herein, raised no issue; that the petition for limitation of liability stands alone; that all evidence introduced was relevant to no issue raised and that judgment on the pleadings should be ordered in petitioner's favor.

Subtopic II.

NO NEGLIGENCE RESULTING IN THE DEATH OF EARLY HAS BEEN PROVEN.

A. The common carrier owes only a high degree of care to passengers.

In the case of *Elder Dempster Shipping Co. v. Pouppirt,* 125 Fed. 732, at page 736, the Court in considering the care owing to a passenger, said:

> "Assuming that the libelant occupied the position of a passenger in this steamship, and that as to him the ship was a common carrier, what was the responsibility of the shipowner to him? In Boyce v. Anderson, 2 Pet. 150, 7 L. Ed. 379, Chief Justice Marshall, after stating the doctrine of the common law that a carrier is responsible for every loss which is not produced by inevitable accident, says that

> this doctrine cannot be applied in the case of passengers, living beings, over whom the carrier cannot have the same control as he has over inanimate matter. He applies this modification of the doctrine to the carriage of slaves, and says that in that case the carrier was only liable for ordinary neglect, that being the law with respect to the carriage of passengers."

This case is extremely valuable for the extended discussion of the question of care.

In the case of *The City of Boston*, 159 Fed. 261, the Court states at page 266:

> "But the degree of care and diligence required of carriers of passengers under any circumstances is not necessarily the utmost care and diligence which men are capable of exercising, it is 'the utmost care consistent with the nature of the undertaking, and with a due regard for all other matters which ought to be considered in conducting the business' ".

In the case of *Pratt v. North German Lloyd*, 184 Fed. 303, at page 304, the rule was thus stated:

> "The trial judge having charged the jury very fully to the effect that the defendant was bound to exercise reasonable care under the circumstances, the plaintiff asked him to charge that the defendant owed the plaintiff 'very great care'. He declined to charge otherwise than he had charged. We think the charge was right. 'Very great care' is an unmeaning phrase, and the jury in determining what was reasonable care with reference to the circumstances would necessarily determine whether it was great or very great. Such expressions as 'the utmost care' or 'the highest degree of care' and so forth are appropriate to the seaworthiness or roadworthiness of the vehicle of transporta-

> tion. or to things inherently dangerous. Obviously the degree of care appropriate to boilers or to the sufficiency of the hull of a steamer or the body of a car or stage is very different from the degree of care required with reference to the washing of decks or the maintenance of a window sash or a curtain hook."

From the preceding we may state that the following propositions of law are established:

1. That a common carrier, though an insurer of goods, is not an insurer of passengers as the latter, as living beings, have intelligence and volition and will not stay where placed.

2. The care which must be exercised is the utmost consistent with the nature of the undertaking and with a due regard for all matters to be considered in conducting a business.

3. The care varies in regard to the particular part of the vehicle it refers to.

Applying the law above stated to the particular case, the Court must consider the fact that to Early as a living being with intelligence, was not due extraordinary care. He was expected to use his intelligence in conducting himself about the ship. He knew the ship, having travelled on it for five years (page 79, Apostles). He knew the proximity of the water to the cargo-port door, and he knew that he was supposed to leave that door alone (page 222, Apostles). In spite of that fact he did open the door and took the position which resulted in his death.

Moreover the company is not called upon to display care in regard to matters incident to transportation, that it is to the hull and boilers of the ship. The court must consider the nature of the fault charged, which consisted at most, in not protecting an individual against a known custom of opening the door, a custom which did not result in a foreseen accident. In this reference it is noteworthy that an accident of this character never had occurred on the "Antelope" prior to this time and that in spite of the fact that she had carried hundreds of thousands of passengers (page 187, Apostles). See *The Southside,* 155 Fed. 364. The Court must also consider the character of Humboldt Bay, that it is a small bay and not rough, and that the trip was of only fifteen minutes duration (page 185, Apostles). Furthermore, the Court must consider the nature of the business which called for only three trips a day and which did not justify the employment of a larger number of employees to operate the boat, either from the standpoint of the business carried on, the nature of the voyage nor the capital invested. In view of all these considerations we think that the Court will hold that the care exhibited by the Coggeshall Launch Company was sufficient.

B. In order to justify a decree against the owners of the ship, the negligence charged must have been a contributing cause to the injury.

This proposition but states the rule that there must have been a causal connection between the

negligence charged and the injury. The rule of causal connection is fully discussed in the case of *Milwaukee Ry. Co. v. Kellogg,* 94 U. S. 469; 24 L. Ed. 256, where the Court states at page 474:

> "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft cited case of the squib thrown in the market place. Scott v. Shepherd (Squib case), 2 W. Bl. 892. The question always is: was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. These circumstances in a case like the present, are the strength and direction of the wind, the combustible character of the elevator, its great height and the proximity and combustible nature of the saw-mill and the piles of lumber. Most of these circumstances were ignored in the request for instruction to the jury. Yet it

> is obvious that the immediate and inseparable consequences of negligently firing the elevator would have been very different if the wind had been less, if the elevator had been a low building constructed of stone, if the season had been wet or if the lumber and the mill had been less combustible. And the defendants might well have anticipated or regarded the probable consequences of their negligence as much more far reaching than would have been natural or probable in other circumstances. We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self operating, which produced the injury."

The citation brings out clearly and forcibly the rule that the negligence and injury must be linked together as a natural whole without a new and independent cause intervening between the wrong and the injury.

Consequently, if the Coggeshall Launch Company was negligent in failing to have a full complement of men, nevertheless, unless this was a proximate cause of the injury complained of, no recovery could be had. This is true even if the negligence consisted in a public wrong. It is a well known rule that

public wrong will not be a basis of negligence unless it was the proximate cause of the injury. If a driver of an automobile injures a person his negligence can not be proven by the fact he was carrying a concealed weapon in violation to a city ordinance. This principle is recognized in Admiralty. In the case of *Boston Marine Ins. Co. v. Lumber Co.,* 197 F. 703, we have a situation where the steam vessel "San Pedro" went to sea one man short, which was contrary to the rules and regulations of the inspectors. The Circuit Court of Appeals in upholding a District Court judgment that there was no causal connection between the shortage and the accident states on page 706:

> "On the voyage on which the collision occurred, the San Pedro was one man short of the number of seamen required by her certificate of inspection, and it is urged that the trial court erred in finding that that shortage was not one of the proximate causes of the loss, that, if there had been a full crew, a man might have been stationed between the lookout and the officer on the bridge, to pass the word from the former to the latter. But there is no evidence that on any prior voyage any such practice had ever been adopted, or that there was any necessity therefor, or that such an intermediate lookout would have been employed if the complement of the crew had been full. There was no legal requirement for the use of such an intermediary, and there is no proof whatever that the mate did not hear all the calls of the lookout."

In the case of *Gretschmann v. Fix,* 189 Fed. 716, a situation was considered where there was an

inspector's regulation that every barge carrying passengers in tow and engaged in excursions should be supplied with two yawl boats, one to be manned and towed; where the deckhand running the yawl boat left the same to get a drink of water; where the deceased entered the yawl during the deckhand's absence, and fell overboard and was drowned. The Court states the law to the situation in the following words on page 718:

> "Hence it must be affirmatively shown that the respondents, owners of the vessels, were negligent as a result of which the injury was sustained, and, furthermore, that the decedent was free from contributory negligence. Robinson v. Detroit & C. Navigation Co., 73 Fed. 883, 20 C. A. 86; The A. W. Thompson (D. C.), 39 Fed. 115; The City of Norwalk (D. C)., 55 Fed. 98.
>
> Giving force and effect to this rule it is difficult to perceive how the libelant may be permitted to recover herein. It is impossible to say that the decedent would not have entered the lifeboat if it had been properly manned. It is idle to indulge in any speculation as to what would have occurred if the deckhand Finn had remained on the lifeboat or if the decedent's associate had not first taken a seat therein. It is thought impossible to determine that the fatality was due to any other cause than the voluntary and obviously negligent act of the decedent in placing himself in the lifeboat—a dangerous place. He clearly had no right or license to enter it even though it was unattended. His stumbling or slipping while in the act of leaving the boat, as a result of which he fell into the river, was the consequence of his initial negligent act. The asserted negligence of the respondents in failing to have a

> man in the lifeboat at the precise time the decedent boarded her was not the direct cause of the drowning. The absence from his post of the man appointed to man the yawl boat was not the approximate cause of the regrettable occurrence. His absence was not an invitation to the decedent to draw the boat to the stern of the barge and seat himself in her, as she obviously was not provided for such use. Neither the master of the steamer nor any one in charge of the barge had warning of the decedent's intentions, and they could not be expected to have anticipated them. The Supervising Inspectors' rule was not designed to prevent passengers from negligently entering the yawl boat; its primary purpose is to assist in relieving or rescuing passengers who might fall overboard and to give relief in case of other accident or danger to those on board."

The three decisions, unquestionably law, determine that in order to permit a recovery, the death of Early must have been the direct consequence of some negligence by the petitioners; that a negligence which has no causal connection with the injury is not a basis for a negligence action; that an intervening cause will destroy a causal connection once established. The law, as contained in the decision applied to the particular case, concludes that the violation of the inspectors' regulation does not of itself prove negligence; the fact that the boat operated with one man short was not the proximate cause of the death of Early. The presence of that man would not have prevented the accident, as he was stationed on the upper deck (page 184, Apostles); and assuming that the absence of the

man afforded the opportunity for Early to open the door, as in the Gretschmann case, which it did not, still the closed door was not an invitation for Early to open the same. The death of George D. Early was the result of his own initial negligent act in opening that door contrary to warning by the boat (page 222, Apostles), an act which exposed him to a danger resulting in the loss of his life.

Subtopic III.

THE FACTS DISCLOSE THAT THE PROXIMATE CAUSE OF THE ACCIDENT WAS THE NEGLIGENCE OF EARLY OR OF HIS COMPANIONS.

This proposition is here given a consideration upon the assumption that Early and his companions were warned not to touch the door which, when opened by them, afforded the space through which Early fell into the water. There is considerable evidence of such warning not to open the door being given and was so found by the District Court, which, however, was not satisfied that the warning had been heard by Early, and which contended that the attempts to enforce the warning eventually resulted in acquiescence to the same.

In considering the proposition of this subtopic it is necessary to also consider a number of rules of law which bear upon it. In particular appellant believes that:

a. Where a position on or mode of egress from a carrier is dangerous, and the danger is apparent,

a passenger can not recover for injuries caused while occupying the dangerous position or taking the dangerous mode of egress.

b. Where the passenger was requested not to occupy a dangerous position and refused to comply, he assumes the dangers attendant upon occupying the same.

c. Where the carrier had a rule that a certain position on the carrier should not be occupied by passengers and, although it publishes the same, does not enforce the rule, and the passenger is injured by violating the same, mere non-interference of the carrier does not vitiate the risk assumed by the passenger.

d. Where an accident occurred in an unforeseen way, the carrier is not liable, and the fact that a notice has been given warning a passenger away from the particular place, is not necessarily evidence that the accident could have been foreseen.

A. Where a position on or mode of egress from a carrier is dangerous and the danger is apparent, a passenger can not recover for injuries incurred while occupying the dangerous position or taking the dangerous mode of egress.

In the case of *Plant Ins. Co. v. Cook,* 85 Fed. 611, the Court was confronted with a situation where the carrier had provided a rough gangplank with a row of cleats extending down a slippery incline; where the passenger disregarding the two safe modes of ingress, walked between the rough gangplank

and the cleated sections, slipped on the same and was injured. The Court in holding that the injury was the result of the negligence of the passenger states at page 613:

> "It is certainly well established, and should be thoroughly understood, that passengers cannot willfully disregard the measures provided by transportation companies for their protection and safety, and deliberately go between and past them, onto slippery and dangerous places, and thus cause their injury, and then recover damages. If this were possible, it would be difficult to conceive of a condition where the company would not be liable for accident under any circumstances, regardless of the amount of care they might take."

In the case of *Elder Dempster Shipping Co. v. Pouppirt,* 125 Fed. 732, the passenger went forward from the bridge of the carrier, to a point where the crew were tearing away certain housing which had become unnecessary. A large timber was cast overboard by the crew and in swinging with the water, the upper end, which was still on the ship, moved forward across the deck and struck the libelant. The Court states on page 739:

> "Why did he go there? He knew that on the bridge he was safe. He could not avoid knowing that on the Montenegro, where the work was going on, he was in more or less danger. There certainly was no necessity for him to go down upon this deck. He did it voluntarily. If he went there from curiosity, or to take exercise, or from any other motive, he was using his right as a reasonable being, but at the same time he assumed the risk. He could only have been prevented from doing that

> which he did by being shown the danger, which was unnecessary, as he could himself see it without being told, or by being forcibly arrested, carried back to the cabin, and confined there—a doubtful proceeding with regard to one not one of the crew."

Further on the Court says:

> "Can it be said that under these peculiar and unusual circumstances the shipowner owed a duty to the libelant to warn him of that which he already knew, and to station a man to pull him out of a danger from which he, of his own prudence, should have retreated? Unless there was a duty there was no negligence, and unless there was negligence there can be no recovery."

From the statement of facts the Court concludes on page 740:

> "In our opinion, the proximate cause of the injury was the act of the libelant himself. He was in a place in which he had no occasion to be, certainly no necessity for being. He suffered the consequence of his own act."

See, also,

> *Strutt v. Brooklyn & R. B. R. Co.,* 45 N. Y. S. 728.

If the rule set forth above is correct, and if we can say in the particular case that Early deliberately chose to take a position in a doorway opened by himself, a doorway which opened directly upon the deep waters of the bay, will this Court not hold that the conditions were created by himself, and that the resulting death was caused by his negligence and no other?

A stronger case can not be conceived. Early was not a child. He was a man of twenty years (page 79, Apostles). For five years he had been earning his own livelihood (page 79, Apostles). He had worked in a lumber mill, where the Court knows dangers lurk in every saw, in every chute, in every log, in every gangway along which vehicles are passing.

Early was a grown man accustomed to looking out for himself. More than that he was familiar with the "Antelope" as he had travelled on it for five years (page 79, Apostles). In spite of his age and his intelligence he deliberately opened a door, and was drowned as a result thereof. Did he not go to a place of danger voluntarily and was not the injury a result of his own negligence?

But the Pouppirt case was not one where a wraning was given. In our case warning had been repeatedly given (page 222, Apostles). Early is deemed to know of any warning which is published, having travelled on the boat for five years. In view of this added factor, not found in the Pouppirt case, should not the rule in this case be that

> "passengers cannot wilfully disregard the measures provided by transportation companies for their protection and safety, and deliberately go * * * onto * * * dangerous places"?

The law has gone still further than the preceding decisions delineate. It has been determined that where the passenger, not only has not been warned against a particular dangerous mode of egress, but has been practically invited to take the particular

dangerous mode, still the passenger and not the carrier is liable for an injury resulting from the use. *Watson v. Ry.,* a New Jersey case reported 19 L. R. A. 487, is a case recognizing the principle, but holding against the carrier because of the facts did not come within the principle. The annotation states that "The interest of the above case is in illustration of established principles in the particular facts of the case". As much as is important to this discussion is contained in the words of the Court at page 488:

> "The proofs satisfactorily establish that the plaintiff was practically invited by the defendant's employees to pass from the boat by the vehicle way. The northerly passenger exit was closed. The southerly exit was narrow. When the boat was made fast to the bridge, although there were no animals or vehicles upon it, a gangplank or slide was drawn to it from the bridge, and the vehicle way gate, behind which there was a waiting crowd, was thrown open, as though a signal to the crowd to pass off that way. The plaintiff was among the first of those who availed themselves of this offered exit. The use for which the way he took was designed, was the transfer of controlled animals and vehicles to and from the boat. Passage over it brought to him knowledge of its customary use, and suggested a prudent watchfulness against the dangers attendant upon that use. In other words, it was a place of obvious danger from a certain use, against which it was the plaintiff's duty to guard, and the invitation to pass that way did not absolve him from the reasonable performance of his duty in this respect."

This case concludes the claimant of any cause of action. Early was not invited to adopt a particular position. He did it of his own volition. But even if he had been invited, still the carrier would not be liable.

B. Where the passenger was requested not to occupy a dangerous position and he refused to comply, he assumes the dangers attendant upon occupying the same.

In the case of *Fisher v. West Virginia & Pittsburg Ry. Co.,* a West Virginia case reported in 23 L. R. A. 758, we find a very full and learned discussion of the relative duties of carrier and passenger in view of a situation where the passenger disobeys an order not to ride upon the platform of a car. As the whole question is much better discussed in the citation itself than it could be by any consideration given to it by the writer of this brief, the writer recommends the case to the Court.

C. Where the carrier had a rule that a certain position on the carrier should not be occupied by passengers, and although it publishes the same it does not enforce the rule, and a passenger is injured by violating the same, the mere non-interference of the carrier does not vitiate the risk assumed by the passenger.

Certainly the mere silent acquiescence or non-interference of the carrier's conductor or agent in

charge of the vehicle will not authorize the person to ride in a place he knows to be dangerous.

Files v. Boston etc. Ry. Co., 149 Mass. 204; 21 N. E. 311; 14 A. S. R. 411;

Radley v. Columbia River Co., 44 Ore. 332; 75 Pac. 212; 1 Am. Cases 447.

In the case of *Dodge v. Boston & B. S. S. Co.,* a Massachusetts case reported in 2 L. R. A. 83, we find a situation where the carrier had provided a safe and convenient place for passengers to land from the saloon deck, and where in spite of this fact, the passenger walked ashore over a plank thrown from the ship to the wharf, and was injured. The Court stated its view in no uncertain language on page 87:

> "A passenger is bound to obey all reasonable rules and orders of a carrier in reference to the business. The carrier may assume that he will obey. And the carrier owes him no duty to provide for his safety in acting in disobedience. His neglect of his duty in disobeying in the absence of a good reason for it, will prevent his recovery for an injury growing out of it."

How do the facts of our case fit in with the law stated in the preceding cases? The Coggeshall Launch Company had reasonable rules, and it had a right to assume that Early would obey them. Moreover the Coggeshall Launch Company owed him no duty to provide for his safety while he was acting in disobedience. Early took a place not appropriate for the carriage of passengers. There is no evidence of incompetence or mismanagement on the part

of the crew, nor was the passageway insecure. The precautions of the company were ample. The door was enclosed making the lower deck a safe place to ride. Early was familiar with the boat. It required no great degree of intelligence to understand that the lower deck was more dangerous with the door open, and it was apparent why it was closed.

Certainly, Early was drowned through his own negligence.

D. Where an accident occurred in an unforeseen way, the carrier is not liable and the fact that a notice has been given warning a passenger away from a particular place is not necessarily evidence that the accident could have been foreseen.

The above proposition presents one phase of appellant's position. The facts disclose that there was no necessity of keeping the door closed and the bar up, as the steamship inspectors had required the bar up only when the door was open (pages 175, 177, Apostles). The District Court came to the conclusion that in spite of these regulations, still as a matter of practice the bar was always up even when the door was closed (page 278, Apostles). This conclusion has some basis of testimony upon which to rest, but of the nine witnesses who testified to the fact, four unimpeached witnesses gave evidence that the bar was often down when the door was closed (pages 182, 211, 226, 257, Apostles). Three testified they had never seen the bar down and the door closed (pages 85, 121, 139, Apostles),

one of whom was William Early, a brother of deceased (page 8, Apostles), and another, Otto Johnson, had been travelling on the "Antelope" only three or four weeks (page 138, Apostles) and he admitted he had, on the day of the trial, made a different statement (page 142, Apostles). And of the remaining witnesses one Alva Moss, testified the bar had always been up (page 105, Apostles) but admitted he had made a contrary statement five months before the trial and the other testified in his direct examination that the bar had always been up (page 147, Apostles) and then reversed himself in his cross-examination (page 152, Apostles). The facts further disclose that for a long time the Coggeshall Launch Company had warned the passengers not to open the cargo port door or remove the bar or use the freight gang plank as a mode of egress (pages 222, 259, Apostles). Early had travelled on the ferry boat for five years and is presumed to have heard the warning, to have known it and to have been acquainted with his surroundings (page 79, Apostles). He disregarded the injunction on the particular occasion and placed himself in a position which resulted in his death. The Coggeshall Launch Company had never experienced a like accident. Never had a man fallen from the lower deck into the bay. The "Antelope" had carried many hundreds of thousands of passengers on Humboldt Bay (page 187, Apostles). The ground upon which the contention is to be sustained is one of law. The following decisions decide the main proposition.

Among a number of immigrants on the steamer Noordland, as the vessel was docking December 25, 1907, was a child, Ichil Kohn. He became separated from his mother, and in some way not explained, placed his hand in a hawse hole through which a heavy cable passed. As it moved, it ground off three of the child's fingers. In considering the case in *Kohn v. International Mercantile Marine Co.,* 180 Fed. 495, the Court at page 496 states:

> "It seems clear that the only ground upon which negligence can be charged against the respondent is the failure to keep the passengers away from the hawse hole. The respondent was not obliged to have a permanent guard about the hole, any more than the Burgundia (D. C.) (29 Fed. 264) was obliged to protect a rudder chain which was carried in an open trough across the main deck. Cables must have room to play and to be moved about, and it is evident I think that a permanent protection could not be properly required. It is therefore clear, in my opinion, that if any duty rested upon the ship it was to do one of two things: Either to station a man at the hawse hole to be continually on guard, or else to rope off that part of the deck altogether. There is no evidence that the hawser was improperly put into service, or that any negligence caused it to slip or to jerk. So far as appears, the work of getting the ship to the dock was being carefully carried on, and it is certain that the mere tightening of the cable was not in itself a negligent act. Unless, therefore, there was negligence in failing to anticipate that small children, incapable of observing and understanding the danger presented by the rope and the hole in combination, might be in the neighborhood without a caretaker—for ordinarily there was

no peril in the situation, and adults might properly be expected to look out for themselves and for those in their immediate charge—and in failing to take precautions against such contingency, there is no liability on the part of the respondent. Upon this question I am of opinion that the contingency was too remote to impose the duty of guarding against it, and therefore that the respondent's negligence has not been established."

In the case of *The Caracas,* 163 Fed. 662, at page 663, an unforeseen accident was considered in the following language:

"It would seem that if the libelant, in order to avoid the discomfort of a wetting, attempted to climb upon the skylight, and thereby pulled the protecting frame from the glass, and then leaned upon the glass, no liability should rest upon the vessel. Certainly no negligence can be imputed for an occurrence happening in this manner and under such circumstances. The testimony of the ship's officers, and of every one connected with the matter, is that the rods in the protecting frame were not of sufficient strength to hold a person leaning his full weight upon one hand, or planting a foot upon the frame. But the libellant charges that the accident happened when the frame was not in place, and therefore the question as to whether the frame was sufficiently heavy to protect a person from falling need not be considered. The skylight was not intended as a place upon which to sit, nor to climb, and the frame was designed to protect the glass from objects of any sort which might fall thereon. It cannot be considered negligence to have not anticipated that this frame could be pulled from its place by a man of ordinary size, when tossed around by the motion of the ship, or slipping back

> under the effect of an extraordinary wave. Such an occurrence is an accident pure and simple."

The facts of the case of *The Southside,* 155 Fed. 364, were in a great measure like those of the case at bar. The decedent fell overboard and was drowned. The evidence brought out that he had been leaning on the gates at the front end of the boat, and through some moving of his or lurching of the boat he fell from the deck. The gates seemed to be in good order. There was a notice "Hands off the gates". In our case we have a passenger familiar with his surroundings, not merely leaning against a good and sufficient gate, but opening it and taking a position which resulted in his falling overboard and drowning. We have not only a passive negligent act but a positive negligent act by the deceased. In view of the similarity of facts it is well to consider the wording of the decision on page 368:

> "It has been urged that other people leaned against the gate but that seems to be immaterial. When the gates were erected notice was printed in a conspicuous place near them that they were not to be handled. When a passenger did handle them, notwithstanding the warning, and came to grief, it seems to have been a case of negligence on his part fully accounting for the accident.
>
> The fact that millions of passengers were carried on this boat and similar ones during a series of years without any accident happening from the use of the gates is strong proof that the petitioner could not anticipate any such trouble as ensued, and is therefore not liable

> for the result of this accident. Cleveland v. New Jersey Steamboat Co., 68 N. Y. 310; Loftus v. Union Ferry Co. of Brooklyn, 84 N. Y. 455, 38 Am. Rep. 533; Hubbell v. The City of Yonkers, 104 N. Y. 434, 10 N. E. 585, 58 Am. Rep. 522; Race v. Union Ferry Co. of New York and Brooklyn, 138 N. Y. 644, 34 N. E. 280."

The Court particularly discusses the question of other people leaning on the posts and holds it is immaterial; that the material thing is whether a passenger handled the gates in spite of a warning. In our case, too, the fact that others had handled the cargo-port door was immaterial. The fact that Early in spite of the warning repeatedly given to the passengers handled the door and came to grief is the material thing. The second matter which the excerpt discusses is the evidence pointing to the accident being unforeseen. The Court recognizes that the fact that a great many passengers were carried without an accident similar to this is strong proof that the accident was unforeseen. There is absolutely no evidence that a single accident ever occurred of this nature and there is evidence that no accident of this character had happened in the history of the boat, and that in spite of the fact that she had carried at least three hundred thousand passengers. The accident being unforeseen is one for which the petitioners are not liable.

The rule of *The Southside, supra,* and here presented is strong authority that the contingency which

occurred in this case was not to be foreseen. In *Milwaukee Ry. Co. v. Kellogg, supra,* the Court states the rule that

> "it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attending circumstances".

If no such accident had happened prior to this time, that fact is strong evidence that the accident was not foreseeable "in the light of attending circumstances".

The inverse of this rule, to wit: the value of evidence of similar accidents, is recognized in *Leslie Ingallo v. Monte Christo O. & D. Co.,* 54 Cal. Dec. 319.

Subtopic IV.

THE FACTS DISCLOSE THAT EARLY WAS GUILTY OF CONTRIBUTORY NEGLIGENCE.

This subtopic discusses the situation upon the assumption that the Coggeshall Launch Company was negligent; but in spite of this negligence the appellant contends that the judgment of the District Court was in error because the deceased did not act as an ordinary prudent man would have under the circumstances.

The first consideration is the circumstances under which it is contended Early acted negligently. The judgment rendered by the District Court is not

explicit as to the facts upon which the same is based (see page 296, Apostles). The opinion of the Court, however, states the facts briefly as follows:

> "This lower deck is almost on a level with the surface of the water, and is wholly enclosed. On the starboard side, however, through this enclosure there is a doorway six or eight feet wide, known as the cargo-port, through which it was the custom of petitioners on the Samoa side to take on both passengers and freight. This doorway is closed by a sliding door, which is opened by sliding it aft. When the door is open and the vessel if away from the dock, the open doorway leads right out to the water, and there is nothing to prevent a passenger from falling or walking directly through it into the water, as outside of the door there is but a guard, level with the deck, and about a foot in width. As a protection to the passengers on the lower deck therefore, a bar about six inches in width, and, when in place, extending across the port opening at a height of between three and four feet, had been provided by order of the inspector (pages 277, 278, Apostles).
>
> On the evening of January 15th, 1915, and with conditions on the 'Antelope' as above set forth, George D. Early was a passenger from Samoa to Eureka, and was among those carried on the lower deck. He had been going back and forth on the vessel between Eureka and Samoa for several years. On this evening as the vessel approached the Eureka side the cargo-port door was opened as usual by one of the passengers. Indeed, it was opened by the same passenger who had closed it before leaving Samoa. He was assisted in opening the door by another passenger and when the door was within about two feet of being fully opened it stuck, and the two passengers who had opened it thus far seemed unable to get it fully opened. At this stage of the proceedings Early came to their

assistance and placed his hand on the door to aid in shoving it back, and whether because of a lurching of the vessel, or because the support afforded him by the door failed him by reason of its sliding further back, he fell apparently backwards through the open doorway into the waters of the bay and was drowned (page 281, Apostles).

It must be observed in this connection that deceased did not open the door at all at the place where he fell through (page 284, Apostles).

From all the surrounding circumstances I am compelled to the belief that with his attention fixed on the door which had stuck, he approached it with his side to the doorway, without observing or pausing to observe its unprotected condition, but relying on the fact that the bar had always been in place. It was between five-thirty and six o'clock in the evening of January 15th, and while not yet dark, it was not wholly light. And though an examination would have disclosed to him the absence of the protecting bar," etc. (page 285, Apostles).

The facts as set forth in the opinion, though fairly explicit do not state the whole of the testimony of the witnesses; and when reference is made in this subtopic to witnesses, it is desired that the Circuit Court of Appeals know that *every bit of evidence upon which this argument will be based is from the lips of the appellee, and her witnesses,* except on the one point of the condition of the light. Appellant believes that the District Judge's finding that "while not yet dark it was not wholly light" is consistent with appellee's witness, Emmett Whelihan, who testified on that point (page 152, Apostles), and

with appellant's witnesses John Mason and E. J. Weber (pages 205, 213, Apostles).

The following is therefore a statement of the facts of interest in this investigation and testified to, with the above exception, by appellee's witnesses.

On the lower deck of the "Antelope" there was a large doorway, the bottom of which was a foot or a foot and a half above the water edge (Apostles, pp. 81, 82). This doorway was about seven or eight feet wide (Apostles, p. 82). A door to this opening, which was on the starboard side of the ship, slid toward the stern of the ship when being opened (Apostles, p. 140). On the outside of the doorway there was a place for a bar, which protected the opening when the door was open (Apostles, p. 82). This bar was about three feet from the deck and could be removed (Apostles, p. 82). The bar was always up whether the door was opened or closed (Apostles, p. 100). This bar was five or six inches wide (Apostles, p. 116), and was an inch or two outside the doorway (Apostles, p. 117). Outside and on a level with the lower deck was a guard rail half a foot to a foot wide (Apostles, pp. 82, 132).

The deceased had been travelling on the "Antelope" for five years prior to the accident (Apostles, p. 79) and was at that time twenty years of age (Apostles, p. 79). There was a number of boys, close friends of the deceased, who were accustomed to ride on the lower deck sitting near the door (Apostles, pp. 101, 120). Among these close friends

or acquaintances were Alva Moss (Apostles, p. 101), who had travelled on the "Antelope" for three years (Apostles, p. 93), Joseph Whelihan (Apostles, p. 126) and Emmett Whelihan (Apostles, p. 146). The passengers were accustomed to open and close the door (Apostles, pp. 95, 120), and these boys who travelled with the deceased had done so (Apostles, pp. 100, 120). Also they would take down the bar (Apostles, p. 153). Early had opened the door before that night and had taken down the bar (Apostles, pp. 153, 154).

On the particular night of the accident Alva Moss went over and closed the door while the vessel was at Samoa (Apostles, p. 95). He noticed the bar was down (Apostles, p. 106). There is no evidence that Moss mentioned this fact to Early or any other of the passengers. The deceased was riding on this lower deck leaning against the wall on the starboard side of the ship (Apostles, p. 156). He was with Joseph Whelihan, Alva Moss and Emmett Whelihan and about three feet from the door (Apostles, pp. 120, 122). On the way over and in accordance with their custom (Apostles, p. 120) two of the boys, Alva Moss and Emmett Whelihan, opened the door (Apostles, pp. 97, 146). The door, however, stuck about one or two feet from being entirely open (Apostles, pp. 97, 146), and Early got up and assisted completing the opening of the door (Apostles, pp. 102, 122). While the three boys were working in completing the opening of the door (Apostles, p. 135) Moss was the inside man (Apostles, p. 117),

Early was in the middle (Apostles, pp. 135, 136), and the third fellow, evidently Emmett Whelihan, was pushing on the outside (Apostles, p. 134). Whelihan knew that he was pushing upon the door but he does not know his position (Apostles, p. 154). The evidence is confusing as to which hand Early used in pushing on the door. Moss testified that it must have been his right (Apostles, p. 107). Joseph Whelihan says he pushed with his left hand (Apostles, p. 134) and then again states it was the right hand (Apostles, p. 135). Emmett Whelihan does not know which hand Early used (Apostles, p. 151). The pushing of the three was exerted at the lock end of the door with the outside man not very far from where the bar would have been if in place (Apostles, p. 136). When the boys got the door open Early stepped back a foot and leaned as if he expected the door but there was no door there (Apostles, p. 130). There is other evidence to the effect that Early leaned back to where the bar should have been (Apostles, p. 122), that his arms went up in the air (Apostles, p. 107) and he fell into the water (Apostles, p. 122).

The evidence of Otto Johnson also offered by the appellee and the only one of the witnesses not shown to have been on intimate terms with the deceased, testified that after assisting in shoving at the door, Early stepped back out onto the guard rail, across the point where the bar would be, lost his balance sidewards and backwards and fell overboard (Apostles, pp. 140, 141).

There is no evidence in regard to any obstruction causing the fall. Neither Moss nor Emmett Whelihan know how Early's accident occurred (Apostles, pp. 116, 172).

It was testified to that the boys were in the habit of leaning on the bar (Apostles, pp. 101, 116, 147). Early indulged in this habit (Apostles, p. 147) and the position occupied would be one of facing the water (Apostles, p. 131).

It appears from the evidence that Early had been riding with Joseph Whelihan, among others (Apostles, p. 122) three feet from the door (Apostles, p. 120); that he observed that the two boys were unsuccessful in their attempt to open the door, and that the door stuck (Apostles, pp. 122, 102, 146), and going over to lend a hand, Early walked toward Emmett Whelihan, walking toward the door part of the time (Apostles, p. 165). When he fell, he fell past Emmett Whelihan kicking Whelihan on the heel (Apostles, p. 152). Whelihan had been on the outside of Early, while pushing on the door (Apostles, pp. 135, 136, 134) and had his back to Early at the time he fell (Apostles, pp. 152, 155).

It was not dark at the time of the accident though it was not wholly light (Apostles, pp. 285, 152, 205, 213). There was sufficient light to see that the bar was not up (Apostles, p. 152). Every witness offered by the appellee knew the bar was not in place. Alva Moss noticed it at the time of closing the door at Samoa, and said nothing about it

(Apostles, p. 106. Joseph Whelihan said that he saw the bar was not up (Apostles, p. 131). Emmett Whelihan noticed that the bar was not up when he started to open the door that night (Apostles, p. 152), and Otto Johnson, the fourth of the witnesses, who testified to the happening of the accident, also offered by the Appellee, noticed that the bar was down (Apostles, p. 141). All four witnesses, the only ones who saw the accident itself, three close friends of the deceased, all offered by appellee, one a few minutes before had noticed the absence of the bar in closing the door, and the remaining three had noticed its absence on the opening of the door.

In view of the facts as set forth above the appellants have made the proposition that deceased was guilty of contributory negligence.

Early, on the night of the accident, was standing three feet from the door. He saw his companions open it. He saw the door stick when it was about one foot from wide open. He went toward the door, aided in opening the door, presumably with the right hand, which, when pushing on a sliding door running from stem to stern on the starboard side of a vessel, would have him facing the water. He either saw and disregarded or heedlessly failed to see that there was absent from its accustomed place, a bar which was five or six inches across, and when in place extended the whole length of the opening seven or eight feet long, about three feet from the

floor. The other witnesses to the accident knew of its absence.

The general rule of contributory negligence of passengers is defined in *10 C. J.*, 1096, in the following words:

> "A passenger must exercise ordinary care, and such care only, for his own safety, that is, such care as an ordinarily prudent man would exercise for his safety and security under the same circumstances, and it is a well established rule, that, although there has been negligence on the part of the carrier contributing to the injuries, if the passenger fails to exercise ordinary care and his failure is proximately connected with his injuries he is guilty of contributory negligence which will defeat a recovery."

The question is then presented: Did Early fail to exercise ordinary care which proximately resulted in his death? The appellant believes that he did, in either failing to note the absence of the bar or in disregarding the absence of the bar, if he saw it.

The rule in this particular is as follows:

> "A person is bound to use the senses and exercise the reasoning faculties with which nature has endowed him. If he fails to do so and is injured in consequence neither he, in life, nor his representatives after his death, can recover for resulting injuries."
>
> *Stewart v. Pennsylvania Co.*, 130 Ind. 242; 29 N. E. 916.

Did Early use his senses and the reasoning faculties with which nature endowed him? In answer-

ing this interrogation in the negative appellant has relied upon the following character of cases:

a. Cases whose facts submit to no general characterization except that they involve the principle that a person must use his senses and his reasoning faculties.

b. Cases in which the plaintiff has been held to be contributorily negligent in failing to avoid an unguarded space in a building owned by the defendants.

c. Cases in which the plaintiff has been held to be contributorily negligent in failing to avoid unguared spaces in or about elevators.

A. Cases whose facts submit to no general characterization except that they involve the principle that a person must use his senses and his reasoning faculties.

The first case is that of *Whalen v. Gas Light Co.*, 151 N. Y. 281; 45 N. E. 363, wherein the plaintiff tripped over a stone flag. In considering the question of contributory negligence the Court states:

> "It was a bright day about 11 o'clock in the forenoon. The obstacle over which the plaintiff fell was a large flag stone over four feet in length and three feet in breadth. There was nothing to obscure her vision, her eyesight was good, and she could see as she was walking along the walk. It was not pretended that anything occurred that momentarily obstructed her vision and it is difficult to conceive how she could have avoided seeing the obstacle unless she was heedlessly proceeding in utter disregard

> of the precautions usually taken by careful and prudent people."

In an Indiana case, *Day v. Cleveland C. C. & St. L. R. Co.,* 137 Ind. 206, 36 N. E. 854, the plaintiff, a carpenter in defendant's repair shops, while assisting in obedience to the foreman's order in pushing cars was injured by the fall of a running board which had been improperly left in a dangerous position between cars; neither the plaintiff nor foreman knew that the board had been removed. The Court determined that the plaintiff was guilty of contributory negligence in the following words at page 855:

> "The applicant was ignorant that the running board had not been removed or rescued. The appellant could easily have seen it if he had looked, and, in his testimony gives as the only reason for not looking that he supposed it was not his duty to look but that it was the duty of somebody else to look out for his safety";

and farther on the Court states at page 855:

> "In a case where the servant is one of mature age and experience as in this case, the law never imposes the duty on the master of becoming eyes and ears for his servant where there is nothing to prevent the servant from using his own eyes and ears to avoid danger."

From the preceding cases it may be said then that where there was nothing to obscure the vision of the plaintiff, whose eyesight was good and the obstacle was large, or where if plaintiff had looked he would have seen the danger, the plaintiff has

not used his senses and faculties as an ordinarily prudent person.

B. Cases in which the plaintiff has been held to be contributorily negligent in failing to avoid an open space in a building owned by the defendant.

In the case of *Johnson v. Ramberg,* 49 Minn. 341; 51 N. W. 1043, plaintiff was a customer of defendant who entered defendant's store by a warehouse. Plaintiff fell through an open and unprotected doorway. In discussing the case the Court says at page 1043:

> "The evidence shows conclusively and without denial that the room was so light that any one who looked about him would see the open doorway. The plaintiff admits that he could have seen if he had looked but that he did not look. Not only was the wareroom light but the stairway and the cellar below were light. While the plaintiff was permitted to pass through the wareroom into the store, he could not but know from the surroundings that the place was not a passageway, merely, but that it was also largely, if not principally devoted to the private use of the proprietor connected with his business; and the plaintiff was not justified either in closing his eyes as he went through or neglecting to observe where he went."

The preceding case is one where the plaintiff was not familiar with the surroundings but was held to be negligent. In the case of *Quirk v. Siegel-Cooper Co.,* 60 N. Y. S. 228, affirming same case in 56 N. Y. S. 49, which held that the plaintiff had not been negligent though familiar with the place, the

facts disclose that the plaintiff, a customer, in defendant's store, slipped on an inclined plane temporarily placed on a stairway leading to the basement. On page 229 the Court states:

> "The plaintiff testified that she had been over the steps only the day before and there was no board there then. She said the light from without was somewhat obscured by the display of goods nearby. She knew she was approaching and was about to go down the stairs, but there was nothing to suggest any danger in going on unless she had looked right down at the very spot where she intended to place her advancing foot. Under the circumstances it cannot be held that she was bound to do this as a matter of law."

In differentiating this case with others the Court says at page 230:

> "In *Strutt v. Railroad Co.,* 18 App. Div. 134; 45 N. Y. S. 728, there was no lack of light or other condition tending to interfere with easy observation of the obstacle which caused the accident. The same is true of *Whalen v. Light Co.,* 151 N. Y. 70; 45 N. E. 363."

A case also decided in New York in which a determination was had for the defendant on the ground of plaintiff's contributory negligence was *Sparks v. Siebrecht,* 45 N. Y. S. 993; 19 App. Div. 117.

There the room was light and there was no difficulty in observing the open and unguarded trapdoor, and all the companions of the plaintiff saw and avoided it. It was plaintiff's first time in the building. The Court held at page 993:

> "She walked along without exercising any care whatever to see where she was going. All her companions saw the opening and avoided it. She did not look and her entire failure to exercise any care was the cause of the accident."

These cases are extremely interesting as giving a basis of circumstances under which it may be said that contributory negligence will be found. The factors really resolve themselves down to conditions of observability. The condition of the light, familiarity with the premises, the position of the factor which caused the fall and the experience of others as regards this factor, are the conditions on which the determination is made. In *Johnson v. Ramberg, supra,* the plaintiff was in a well lighted but unfamiliar room. However, the open doorway was apparent and the Court held there was contributory negligence. In the case of *Quirk v. Siegel-Cooper Co., supra,* plaintiff was familiar with the premises, the light was obscured by a display of goods and the factor which caused the fall, to wit: inclined plane on the stairs, was not apparent unless the plaintiff looked down at the very spot where she intended to place her advancing foot. The Court held that there was no contributory negligence. In so determining the Court compares the situation with that of other cases where contributory negligence was found and points out that in these latter cases there was no lack of light and the factor which caused the accident was not obscured by any object and was so placed as to be

within easy observation of the plaintiff. One of the cases cited was *Whalen v. Light Co.,* wherein it was held that though the object was on the ground and plaintiff was unfamiliar with the premises, still because it was light and the object was large, the plaintiff was guilty of contributory negligence. The factors in *Sparks v. Siebrecht, supra,* were that the opening was apparent, and that the plaintiff's companions all saw it, and the Court held there was contributory negligence in failing to avoid the opening.

Taking then the factors of observability relied upon by the Courts in determining these cases, what is the situation in the case now before the Court? Early was familiar with the premises as he had been travelling on the "Antelope" for five years (Apostles, p. 79). He was standing about three feet from the door (Apostles, pp. 122, 120). He observed that his companions had failed in their attempt to completely open the door (Apostles, pp. 122, 102, 146). If he observed this fact he must have also observed the opening created by the door as it was being opened. He approached the door (Apostles, p. 156) and pushed on the same in close proximity of where the bar usually was placed (Apostles, p. 136). It was not dark though not wholly light (Apostles, pp. 185, 152). There was enough light to see that the bar was not up (Apostles, p. 152). The bar itself when in place was three feet from the ground (Apostles, p. 82), extended seven or eight feet (Apostles, p.

82), and was five or six inches wide (Apostles, p. 116). The companions and the only other witness who saw the accident observed that the bar was not in place (Apostles, pp. 106, 131, 152, 141), and evidently believed it so apparent that they did not warn Early.

From the preceding cases, only one factor can be considered as weighing against the contention of contributory negligence and that is familiarity of the decedent. Even that, as will be shown later, is a factor which has been considered by the Courts as a factor in favor of the contention. But assuming that that factor negatives a claim of contributory negligence, nevertheless the situation in the present case presents more factors of observability than any case so far considered. Early had sufficient light to note the absence of the bar; the bar was not at his feet but three feet from the deck; it was not a small object, the absence of which could not be easily noticed, but a large bar five or six inches across and seven or eight feet long. Early did not suddenly come upon the opening. He was near when the door was being opened; he noticed the act of opening the door; he himself approached the door and assisted in completing the opening and finally all the witnesses saw the absence of the bar. From these decisions and these facts appellant contends that Early failed to use his senses and reasoning faculties as an ordinarily prudent man.

C. Cases in which the plaintiff has been held to be contributorily negligent in failing to avoid unguarded spaces in or about elevators.

In discussing this heading appellant desires to point out that there are a great many points of similarity between elevator cases and the one now before the Court.

> "Owners of elevators, although not strictly common carriers of passengers, owe the same duty to those who by invitation express or implied, are transported in the cars of such elevators * * *"
>
> *10 C. J.* 962.

Moreover the item of danger, calling upon passengers in elevators to be cautious is present in this case. The danger of an elevator consists usually in an unprotected door or other aperture customarily used by human beings which leads to a dangerous elevator well, and the danger in the present case is in leaving an unprotected opening leading to the waters of the bay. With this similarity in mind the appellant desires to call the Court's attention:

First, to elevator cases in general.

Secondly, to elevator cases where a bar, has not been in place.

Thirdly, a California elevator case.

1. Elevator cases in general.

In the case of *Stanwood v. Clancey,* (Me.) 75 Atl. 293, the plaintiff, a licensee in the building, was in-

jured by stepping into an elevator shaft, the door of which had been left open. The Court states at page 294:

> "In the first place if the plaintiff was paying the slightest attention to the situation it is difficult to see how he could have mistaken the opening into the darkness of an elevator well for the entrance to an office as he testified he supposed it was. It was a sunshiny day and the door from the street was wide open and only five feet from the elevator. It is impossible to resist the conclusion that the plaintiff was guilty of that thoughtless inattention which has been said to be the very essence of negligence."

In the case of *Ballou v. Collamore,* 160 Mass. 246; 35 N. E. 463, the plaintiff was familiar with the elevator and back stairs of the hotel. He stepped out at the fourth floor of the freight end of an elevator, opened a sliding door of the elevator well and delivered a package. In his absence the elevator boy took a passenger up in the elevator. At page 464 the Court states:

> "Assuming that the elevator was still there the plaintiff went back, and, without looking to see if it was, stepped through the open door and fell to the bottom of the well. The plaintiff knew that the elevator boy could not shut the door without raising the elevator and getting from the passenger part of it into the freight box, and then lowering it to the door. It was not possible to see from the passenger part of the elevator into the freight box and there was no door in the passenger part of the elevator on the side which was above the door into the

> elevator well. The plaintiff contends that there is testimony tending to show that the elevator boy sometimes waited for him when there were passengers in the elevator and that he did not usually shut the door into the elevator well unless told by the elevator boy to do so and he relies upon this as showing due care on his part. But the plaintiff expressly admitted that nothing was said by the elevator boy to him or by him to the elevator boy about the latter's waiting for him. It was at least as probable that he would not wait as that he would. Under the circumstances even a boy of 15 to step through the open door into the elevator well without looking to see if the elevator was there was careless."

And later on at page 464 the Court adds the plaintiff opened the door and knew or ought to have known that at least it was as probable the elevator would be there as not. See also in this connection *Gilfillan v. German Hospital & Dispensary in the City of New York,* 100 N. Y. S. 601.

Applying the language of the preceding cases to the case it would, as was said in *Stanwood v. Clancey, supra,* have been impossible for Early not to have known of the bar's absence if he were paying the slightest attention to the situation. It was light enough to notice it, his companions noticed it and it must be that Early was guilty of that thoughtless inattention which is the very essence of negligence.

With reference to the facts and decision of the *Ballou v. Collamore case, supra,* it is to be noted that Early, without looking at the opening to see

whether his factor of protection i. e. the bar, was there, stepped or stumbled into the bay. In the Ballou case the plaintiff did not look to see if his factor of protection was there i. e. the elevator. Both acted without looking.

2. The second class of cases involved a bar or other protection which had been removed on the particular occasion.

A case which does not involve the proposition, but which is valuable under this head in amplification of the cases which are to follow, is *Donahue v. Broof,* 107 N. Y. S. 377; 122 App. Div. 552. There the deceased went out of a saloon by an unfamiliar way, stepped into an elevator shaft and was killed. The other facts, and the conclusion of the Court is found at page 378:

> "But whatever may be said of defendant's negligence, it is quite clear that the deceased was guilty of contributory negligence. He approached a door which had the appearance of being a door of an elevator, through which there was a light shining, opened the door with his head turned over his shoulder so that he could not see where he was going and stepped into the elevator shaft without looking. The slightest attention to the door before he attempted to open it, or looking after he opened the door, and before he stepped in would have apprised him of the situation and prevented the accident. Certainly nothing in the situation prevented the deceased from seeing where he was going or distracted his attention in such a way as to excuse him from looking. If the deceased had shown the slightest care in examining the door he was about to enter, either before or after he had opened it, or had

> waited until he could have heard the warning of the barkeeper who was following him, the accident would have been avoided."

In the case of *Gray v. Siegel-Cooper Co.*, 79 N. Y. S. 813; 79 App. Div. 118, the plaintiff, a licensee, in the building for the first time, fell through an aperture between the elevator and the walls of the shaft. The elevator shaft had this space of ten and one-half inches due to the fact that the wall became thinner higher up in the building. The Court states at page 814:

> "* * * that when they got to the fourth floor the men started to take the meat from the elevator to put it into the butcher's box; that while they were taking the meat off, the deceased was seen to step back to the rear of the elevator and fell between the wall of the elevator shaft and the elevator, from which he sustained the injuries which resulted in his death",

and on page 816 the Court states:

> "There was nothing to cause deceased to fall; nothing to explain why he went to the back of the elevator. All we have is that upon this morning in a light place, with the condition that existed perfectly apparent, the deceased for some unexplained reason, without any necessity incident upon the work that he was employed to do, went to the back of the elevator and fell between the elevator and the wall"

and later on the same page:

> "This elevator was not for passengers but for freight only. There was sufficient light to show that there was space between the wall and the

easterly side elevator. There was nothing to justify the plaintiff in assuming that any one thus using the elevator would step down into a hole that was perfectly apparent and which an inspection would have disclosed".

In the case of *Amiot v. Foster,* 213 Mass. 573; 100 N. E. 1007, the Court states:

"Between the north end of the elevator and the wall was an opening 2½ feet wide. It was down this opening that the plaintiff fell. On the elevator next to this opening was a wooden bar which could be dropped down across the end of the elevator by the person using it. It was hinged at one end to one of the posts of the elevator and when not in use stood upright against the post being held in that position by a clutch. The extent to which the bar would operate as a protection when down was in controversy by reason of the fact that a diagonal iron brace had been put on the elevator by the defendant and the end of the bar fell on that instead of into the latch originally designed for it. The end of the bar projected half or two-thirds of the way by a post on the side of the elevator where the brace was. There was evidence that, if one put his hand on the bar, when down and leaned on it, it would slip and be no protection. But there was also evidence that it 'was a protection against any one pressing out or falling over that end that way', as it would seem plain that it must have been. The brace with safety gates at the south end of the elevator where it was entered from the three upper floors was put on by the defendant about six months before the accident. The bar was not down when the plaintiff fell and no attempt was made by him to put it down. There was evidence tending to show that it had been used by the tenants either before or after the brace was put on. The plaintiff had

been in Mr. Dick's (a tenant of defendant) employ about 2½ years and as he testified had 'always been around this elevator during the time' that he had worked for Mr. Dick and knew of the bar and the hole at the north end of the elevator. At the time of the accident he was engaged with a truck man in loading onto the elevator at the fourth floor a panel screen of hardwood 10 or 11 feet long and 2 or 3 feet high to be taken from Mr. Dick's place to the storehouse. He was backing onto the elevator with one end of the screen and had backed, as he thought, to within 2 or 3 feet of the edge when, as he testified, 'I stubbed my heel, stepped backwards and fell right over the edge of the elevator at the north end' receiving the injuries complained of",

and on page 1008 the Court says:

"The cases of *Taylor v. Hennessey,* 200 Mass. 263; 86 N. E. 318, and *Freeman v. Hunnewell,* 163 Mass. 210; 39 N. E. 1012, would seem to go far towards disposing of this case on the ground of plaintiff's want of due care. He backed onto the elevator knowing that the hole was there and that the bar was not down. Such an accident as occurred, if not fairly to be expected as within the range of probability, was at least possible as the event has shown and he took no precaution to guard against it. It is no excuse that the bar, if down, would, or might have been a protection or that it had not been used. It was there for the express purpose of being used to prevent a person from falling over the edge of an elevator and until tried and found insufficient no one operating the elevator could neglect to use it except at his peril. If there was a slight depression or worn place in the floor of the elevator which it is difficult to see in the photographic exhibits where the plaintiff might have stubbed his heel,

more rather than less care was required of him by reason thereof. The defendant's failure to comply with the statute or to follow the directions of the inspector of buildings do not affect the question of plaintiff's due care, though bearing upon the question of the defendant's negligence".

The last case to be considered under this head is *Brudie v. Renault Freres Selling Branch Inc.*, 122 N. Y. S. 963; 138 App. Div. 112, which appellant believes involves facts very similar to those at bar. A discussion of the facts are had on page 963:

> "The deceased was a truckman in employ of one P. Brady who had a contract with the defendant to cart its automobiles from the custom house to its place of business. On the day of the accident, the deceased with three other men each driving a truck loaded with an automobile arrived at the defendant's place of business. The method of unloading was to back the truck up to the curb, to let the automobile down on skids by means of a winch and to run it through an opening in the wall onto an elevator platform and then to run the elevator to the floor where it was desired to unload the automobile. It was 10 feet from the curb to the building line. The walls of the building were 2 feet thick and the elevator was 6 inches inside the wall. The elevator was 13 feet deep below the ground floor. On the inside of the wall there was a door which when pulled down completely closed the entrance to the elevator well from the street. It was the habit of the operator of the elevator to pull down the door before raising the elevator * * * It is to be inferred that when the elevator went up the third time, the operator

> did not close the door because, before the fourth truck was unloaded the deceased was observed to walk backward into the elevator shaft * * *"

and on page 964:

> "* * * While the plaintiff contends that there is some evidence that he slipped on the sidewalk and fell into the elevator well, the fact is that there is conjecture"

and later on page 964:

> "* * * Upon very similar facts it was held in *Maxwell v. Thomas,* 31 App. Div. 546; 52 N. Y. S. 30, that on backing into an elevator well without looking to see the door was open or shut, was guilty of contributory negligence as a matter of law. That case was more favorable to the plaintiff in that it appeared that the plaintiff was attempting to put a skid in place and this may have had his attention for the moment diverted from the fact that he was near an opening into an elevator well".

The first case under this heading *Donahue v. Broof* brings out the necessity of an individual using his senses. The only conditions of observability considered were the facts that it was light, that there was no interference with a view, and nothing to distract plaintiff's attention and the Court held the plaintiff was guilty of contributory negligence, because he approached a door having the appearance of an elevator door without looking. The case does not parallel the present case inasmuch as, among other differences, plaintiff was not familiar with the premises; but the case is val-

uable as bringing out the duty of a plaintiff to use his senses.

In the second case, *Gray v. Siegel-Cooper Co.,* the plaintiff was also unfamiliar with the premises, but the case is nearer the one now under consideration. The factors of observability were that the unguarded opening was perfectly apparent and it was light.

In the third case, *Amiot v. Foster*, the situation still more closely parallels the present one. There was a wooden bar which had been placed across one end of the elevator for the protection of passengers. The plaintiff, familiar as he was with the surroundings and knowing the protection the bar afforded in place, backed into the opening which he knew was there. In the present case Early knew or should have known by a proper use of his senses that the bar was not there. He certainly knew that beyond that doorway lay danger and with this knowledge, actual or imputed to him, Early turned his back to where the danger was and fell overboard.

The fourth case, *Brudie v. Renault Freres Selling Branch Inc.,* is remarkably like this Early case. It was customary in both the Brudie case and the Early case to have a protection across an opening when the opening would, without this protection, have been dangerous. The dangerous element in one case is the elevator shaft, in the other, the waters of the bay. In each case the protection

was not put up, and in each case the deceased backed into the open space, in one case by walking, in the Early case perhaps by leaning. In both cases there seems to be contributory negligence.

3. A California elevator case.

There is one California case which appellant desires to call to the Court's attention. In the case of *Kauffman v. Machin Shirt Co.,* 167 Cal. 506, the facts were that the deceased, a boy of fifteen years, used an elevator to deliver a package on the fourth floor of a building. He found the elevator shaft door unfastened, opened it about a foot and walked a short distance on the fourth floor to deliver the package. The door was, to all appearances the same as when he left it. Someone had moved the elevator, however, and Kauffman believing it was there, stepped in to the shaft and falling to the basement died from injuries received. It appeared that the elevator was not maintained in conformity with city ordinances. Paralleling these facts with the present case the Court's attention is called to the fact that Early was twenty years of age, and had for five years been an employee of a lumber mill (Apostles, p. 79); that he watched the opening of the door and when it became stuck he assisted in completing the operation (Apostles, pp. 122, 102, 146); that it was not dark (Apostles, pp. 182, 152); that there was enough light to see that the bar was gone (Apostles, p. 152), and the bar was, when in place, three feet

from the ground, seven or eight feet long (Apostles, p. 82) and five or six inches wide (Apostles, p. 116); and also that the other witnesses knew the bar was not in place (Apostles, pp. 106, 131, 152, 141). In the Kauffman case the protection was the elevator itself and the danger the open shaft; in the Early case the protection was the bar and the danger was the bay. The Court, after disposing of the question of failure to comply with elevator ordinances as not being the proximate cause of the accident, states at page 510:

> "Nor is the situation helped by the allegation that when he returned the elevator and shaft were to all appearances in the same condition in which he left them. There is no statement that he looked or that if he had looked there was any physical reason why he could not have seen that the elevator had been moved. In the absence of any such showing the court must assume that 'to look was to see' and that if he had looked he must have noticed the danger. One may not thus heedlessly disregard the commonest precautions for his own safety. (Green v. Southern Pacific Co., 132 Cal. 254; 64 Pac. 255; Hamlin v. Pacific Electric Ry Co., 150 Cal. 777; 80 Pac. 1109; Brown v. Pacific Electric Ry. Co., ante, p. 200; 138 Pac. 1005. It is true that ordinarily the question of contributory negligence is one largely of fact for the consideration of the jury, but where the standard of conduct required of persons under given circumstances has been plainly neglected by the person seeking relief, it then becomes a question of law. (Hamlin v. Pacific Electric Ry Co., 150 Cal. 777; 89 Pac. 1109, and Brown v.

> Pacific Electric Ry. Co. ante, p. 200; 138 Pac. 1005.)"

And on page 512 the Court concludes:

> "But whether we regard the decedent under the facts pleaded as a mere licensee or as a person using the elevator by invitation of the defendants, we cannot say that he was excused for his failure to observe the absence of the elevator when he returned to the open door of the shaft."

In conclusion it may be stated that the following factors of observability were present in the Early case:

1. It was not dark though not wholly light. One could see the bar *(Wheelan v. Gas Light Co., supra).*

2. The factor whose absence caused the accident was large and situated well within easy vision without looking at one's feet *(Quirk v. Siegel-Cooper Company, supra).*

3. The absence of the bar could easily have been seen if Early had looked *(Day v. Cleveland C. C. & Lt. L. R. Co., supra)* or if he had paid the slightest attention *(Ballou v. Collamore).*

4. There was nothing to obscure Early's vision *(Whalen v. Gas Light Co., supra).*

5. Early first approached doorway after observing his companions partially open the door.

6. Early shoved on the door near the point where the bar would be if up.

7. Nothing distracted Early's attention any more than deceased's attention was distracted in the *Donahue v. Broof* case.

8. The opening was perfectly apparent *(Gray v. Siegel-Cooper Co., supra).*

9. Early's companions all saw that the bar was down *(Sparks v. Siebrecht, supra).*

10. Early approached a doorway leading to a dangerous place with his back to it on an occasion where the protection usually present was not up, and failed to look *(Brudie v. Renault Freres Selling Branch Inc., supra).*

11. There is no statement that he (Early) looked or if he had looked there was any physical reason why he could not have seen that the bar had been moved. In the absence of any such showing the Court must assume that "to look was to see" and that if he had looked he must have noticed the danger *(Kauffman v. Machin Shirt Co., supra).*

In the cases considered it appeared in some that plaintiff was not familiar with the premises. That this is an item which charges the plaintiff with knowledge of the danger was held in the case of *Gilfillan v. German Hospital and Dispensary etc.,* 100 N. Y. 601, cited *supra.*

In the case of *Larned v. Vanderlinde,* 165 Mich. 464; 131 N. W. 165, the Court in determining plaintiff guilty of contributory negligence states at page 169:

> "The only legitimate questions upon this record are whether this defendant was negligent for not lighting or barring the stairs by reason of darkness and whether the plaintiff was herself negligent. The plaintiff has failed to make a prima facie case upon the first and has pretty clearly established the second proposition. The opening railings, newel posts and elevator were in plain sight, and though she walked directly toward them, she was oblivious to their presence. There is no opportunity for any other inference from the testimony."

In this case the opening, the side posts of the door, and the absence of the bar were plainly apparent. Was not Early guilty of contributory negligence?

Conclusion.

The appellant believes that it has proven to this Court:

1. That it was entitled to judgment on the pleadings.

2. That its negligence was not the proximate cause of Early's death.

3. That the death of Early was caused by the negligence of Early or his companions.

4. That Early was guilty of contributory negligence.

In regard to the third point it is again called to the Court's attention that Moss and Whelihan, who

opened the door saw the bar was not there and failed to notify Early.

Dated, Eureka,
October 4, 1917.

Respectfully submitted,

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